Unit 7 - Family Law
SUGGESTED ANSWERS – JANUARY 2011

Note to Candidates and Tutors:

The purpose of the suggested answers is to provide students and tutors with guidance as to the key points students should have included in their answers to the January 2011 examinations. The suggested answers do not for all questions set out all the points which students may have included in their responses to the questions. Students will have received credit, where applicable, for other points not addressed by the suggested answers.

ILEX is currently working with the Level 3 Chief Examiners to standardise the format and content of suggested answers and welcomes feedback from students and tutors with regard to the ‘helpfulness’ of these Suggested Answers.

Students and tutors should review the suggested answers in conjunction with the question papers and the Chief Examiners’ reports which provide feedback on student performance in the examination.

SECTION A

Question 1(a)

Under S.12(c) MCA 1973 a marriage will not be valid unless the parties give their express consent. More specifically consent will not be valid where it is given under duress. In such circumstances the marriage will be deemed voidable. This means that the marriage will be treated as valid until either party chooses to avoid it.

It is sometimes difficult to establish what behaviour will constitute duress but it has been stated in the case of Singh -v- Singh (1971) that there must be fear sufficiently grave to vitiate true consent. This case involved an arranged marriage between two young Sikhs against the girl’s wishes. It was entered into out of obligation and religious tradition. The court said it did not constitute fear. This approach was followed in the case of Szechter -v- Szechter (1971) when sufficiently grave was further defined as “a threat of immediate danger to life, limb or liberty”.

The approach was rather narrow and revolved around threats of imminent danger, suggesting that duress could not be anything else. As a result a different approach was adopted in the case of Hirani -v- Hirani (1982) with the court asking “did the threats constitute undue pressure overbearing the person’s will?”. Thus, the test for duress became more subjective. In this case, the parents of the Petitioner had threatened to throw her out of their home unless she married the man which they had chosen. The court analysed whether the Petitioner had given consent out of genuine fear, irrespective of whether other people would have been stronger. The court held that the parents' threat of homelessness had invalidated the daughter's consent. We see the recognition of emotional pressure.
The case law demonstrates that the duress, the fear, does not necessarily arise from the other party to the marriage, and quite often is from a third party such as a parent or other relative. This was very well illustrated in the case of *Buckland -v- Buckland* (1968). A man was falsely accused of corrupting a 15 year old girl. The father of the girl told him that he would be convicted and imprisoned for years unless he married the girl, which he did. He later obtained a Decree of Nullity due to the pressure from the father. Furthermore, the fear can emanate from the conduct of a totalitarian regime as in the case of *H -v- H* (1954). In this case a young Hungarian girl feared what would happen to her at the hands of the Russian army so married to avoid it. Such fears were held to be valid and sufficient to amount to duress and to allow the marriage to be annulled.

The most disturbing examples of duress tend to arise with “forced” marriages. The most compelling case is that of *P -v- R* (2003). The petitioner was a 21 year old woman. She was persuaded by her family to attend her sister's funeral in Pakistan. After the period of mourning had ended the family arranged for the Petitioner to marry a cousin. She refused and wanted to return to England. Her mother gave her no choice and until the actual wedding she was kept prisoner so she could not leave the village. Her brother threatened her with violence if she did not go ahead with the wedding. She believed she would not be allowed to return to England if she did not marry. On the day of the wedding the Petitioner was forced into her gown and throughout the ceremony her mother held her neck and forced the nodding of her head to indicate consent. When the Petitioner returned to England she issued nullity proceedings. The court were satisfied that she had not consented to the wedding and it had been vitiated by force physical and emotional from her brother, her mother, and other family members and particularly the enormous emotional pressure brought to bear whilst in Pakistan.

To conclude, it would appear that the case law suggests that duress is a coercion of the will so as to vitiate consent. It is important to note that the burden of proof is on the Petitioner to prove lack of consent. Emotional pressure, physical pressure, and pressure from totalitarian regimes can all suffice to vitiate consent, and not simply fearing the threat of violence.

**Question 1(b)**

The D(RM)A 2002, a relatively short statute, inserted a new S.10A into the MCA 1973. The Jewish community sought the assistance of the civil law to afford greater protection to Jewish women. Furthermore, the Act also allows the Lord Chancellor to extend the provisions of the Act, to other faiths, for example the Muslim community.

In Jewish law, an individual cannot be divorced against his/her will. For the divorce obtained through the courts to be recognised in Jewish law, a “get” must also be obtained. The “get” requires co-operation between the parties. The husband must go before a Beth Din court to obtain the “get” and then deliver it to his wife whereupon she is obliged to accept it. In reality the husband was obtaining a divorce through the civil courts and then refusing to obtain the “get.” Without the “get” a Jewish woman could not remarry. If she did she would be stigmatised by the Jewish community and seen as an adulteress, and her children would be regarded as illegitimate.

The Act affords protection to Jewish women whereby the civil divorce court will refuse to grant the decree absolute until a declaration has been submitted signed
by both parties stating that they have taken steps to dissolve the marriage in
Jewish law. The court will refuse the decree absolute only if it is satisfied that, in
all the circumstances of the case, it is just and equitable to do so. Unfortunately,
it is only applicable where the divorce is based on S.1(2)(d) and (e) MCA 1973 –
namely the living apart provisions.

The provisions allow the wife to place pressure on the husband to obtain the
“get”, so that in the future if the wife wishes to remarry she can do so without
stigma and with the approval of her Jewish community, and without any impact
on her children.

**Question 2**

In the case of *White -v- White* (2000) guidance was provided on the approach to
be adopted by the Judges in determining applications for financial relief, and we
saw the shift away from “reasonable requirements”. This case involved a lengthy
marriage with substantial capital assets and substantial pensions. The husband
and wife ran a family farming business, and the husband’s father had lent him
money to build that business. The net assets were in the region of £4.6 million.

On the breakdown of the marriage and financial proceedings the case became
most controversial. At first instance the wife’s award was based on her
“reasonable requirements” following previous case law. However, on appeal, she
received two fifths of all the assets, which may not have been equal but that was
justified because of the father’s contribution. What followed was an interesting
judgment from Lord Nichols which was to change the path of ancillary
applications.

Lord Nichols stated “stop using the term reasonable requirements in big money
cases. The courts should apply all the factors in S.25 MCA 1973 and the overall
requirement of fairness.........there is no presumption of equal division, but as a
general rule only good reasons would be sufficient to allow judges to depart from
the yardstick of equality”.

The new terminology seemed to be this “yardstick of equality”. Furthermore,
within the judgment other principles flowed:-

(a) This approach of the “yardstick of equality” is equally applicable to low value
cases, as was stated and illustrated only one year later in *Elliott -v- Elliott*
(2001). In this case the Court of Appeal ordered a charge in favour of the
husband on the wife’s new home so that the husband would eventually get a fair
division of the assets. The husband was allocated 45%.

(b) The wife's contribution to the home and family is of equal value to the
husband's work in the business. Only where there is something exceptional, a
"stellar" contribution, would a departure from the yardstick of equality be
justified. For example the shopping trolley invention, as illustrated with the case
of *Sorrell -v- Sorrell*.(2002)

© It may be that the practicalities of the situation do not allow equality to be
achieved as was illustrated in the subsequent case of *N -v- N* (2001) in which the
court justified an unequal division of assets because many of the husband’s
assets could not easily be realised. That position was confirmed in 2007 in
*D -v- D & B Ltd* in which the court stated that where there is a long marriage
with equal contributions there is usually equal division but due to difficulties with
valuing, realising and dividing commercial assets means that it is not always
possible.
The concept of achieving fairness by equal division needs to be considered in conjunction with the provisions of the clean break as illustrated in *M-v-M* (2004) in which the court held that an immediate clean break should always be achieved if the assets are sufficient to allow it. In this case the parties had made equal contributions to the marriage. The wife's future contribution to the care of the children, one of whom was disabled, would be offset by payment of child maintenance by the father and therefore an equal division of assets was the fairest solution.

In 2006 two further cases were headlined namely *Miller -v- Miller and McFarlane -v- McFarlane*. These cases looked at the situation, after *White*, where a clean break could not immediately be achieved the court’s duty to consider future assets was especially important where there was certain to be a surplus of income over needs. The surplus could be divided by way of periodical payments with a view to a deferred clean break. However, it was the joined appeals in the House of Lords that became particularly relevant in ancillary relief applications. The House of Lords stated that there should be flexibility but the overriding objective is to produce a fair outcome and fairness can be achieved by reference to:

(a) the financial needs of the parties at present and in the foreseeable future,
(b) compensating the party who gave up a career to look after the family, and build the spouse’s career/business
(c) equal sharing – the yardstick of equality as an aid not a rule.

As a result of inconsistencies in interpretation of *White* and *Miller and McFarlane*, the Court of Appeal attempted to bring all the principles together in the case of *Charman -v- Charman* (2007) to ensure clarity in terms of financial applications. The case involved a 54 year old husband and wife, with two financially independent children, and a 28 year marriage. The wife worked until the first child was born. They started with very little but due to the husband’s business acumen he acquired assets of £130 million. The wife had looked after the home and the children and been his emotional rock. On divorce, the wife was awarded £48 million (36.5% of the assets). It was the judgment that followed that helped to clarify the approach to be adopted to the division of assets. In brief:-

(a) Equality is not a yardstick, but a starting point. Divide equally unless there is good reason not to.

(b) It is a two stage process. Firstly what are the resources to be shared? And secondly, how should they be divided in accordance with the S.25 MCA 1973 factors and case law?

(c) Where sharing does not meet the parties’ needs, then needs must prevail.

(d) If sharing does meet the parties’ needs, then that must prevail.

(e) It may be appropriate to depart from equality where one party has made a special contribution (“Stellar”) contribution.

Again in *L-v-L* (2008) the court felt the need to set out what approach should be used following *Charman*. What is apparent is the lack of consistency so much so that many courts have often referred to the Government’s white paper “Supporting Families” published in October 2008 as a starting point. However, in reality that simply restates the general principles we already have namely, look
at the welfare of any minor child, any written agreements before marriage, the needs of the parties, and achieve a clean break wherever possible. It is important to note that the pension asset is included in “resources”, and non-matrimonial assets also have relevance in terms of being a factor to be considered by the courts on division of the assets. Furthermore, a more current, and controversial factor is that of the pre-nuptial agreement, which up to recently was not recognised in English Law. However, as social attitudes have changed, more cases have been before the courts and pre-nuptial agreements are now being given due consideration in certain circumstances.

**Question 3**

The Human Rights Act 1998 (HRA 1998) came into force in 2000 and challenged and developed family law in several ways. The Act incorporates parts of the European Convention on Human Rights 1998 (ECHR 1998) which the UK has signed and ratified into law. The three key articles which have specific relevance to family law are Article 6, 8 and 12, the right to a fair and public hearing, the right to respect for private and family life, and men and women have the right to marry and found a family. Additional articles are Article 1, peaceful enjoyment of possessions, and Article 5, the right to liberty.

Where primary legislation is incompatible with the ECHR our courts may make a declaration of incompatibility which usually leads to a change in our law. This was seen recently with our definition of marriage. In the case of *Hyde -v- Hyde* (1866) marriage is defined as “the voluntary union for life of one man with one woman to the exclusion of all others”. The courts stated, in cases such as *Corbett -v- Corbett* (1970) that sex was determined at birth irrespective of whether a person had undergone full gender reassignment. This decision remained good law for 30 years and was applied in cases such as *I -v- UK* (2002) *Goodwin -v- UK* (2002) and *Bellinger -v- Bellinger* (2003). However, the latter case did place pressure on the UK Government for change and following a declaration of incompatibility by the House of Lords we saw the introduction of the Gender Recognition Act 2004 (GRA 2004). The effect of the legislation is that a person who has obtained a full gender recognition certificate can legally marry in their acquired gender, thus sex no longer being determined at birth.

The HRA 1998 has had an impact as regards CPA 2004, which stems from the case of *Wilkinson -v- Kitzinger* (2006) in which 2 women were validly married in Columbia. In English Law they were treated as civil partners. They raised arguments under Articles 8 and 12 and more specifically that the requirement that the parties to a marriage be male and female particularly violated those rights. The court found that Article 12 had been interpreted by the European Court to refer to the marriage between persons of the opposite sex. Furthermore, failing to recognise the marriage and instead labelling it a civil partnership did not interfere with their private and family life.

In respect of determination of property rights our domestic courts must take account of the principle in Article 1 First Protocol ECHR that every natural person is entitled to the peaceful enjoyment of his/her possessions, and Article 8 the right to respect for private and family life, home and correspondence. The courts are thus balancing rights of individuals. This is particularly so with regard to financial applications on divorce. In such applications all hearings are held in private which could possibly be a challenge to Article 6 on the basis that cases are to be held in public and anonymity for parties could be maintained via the use of initials.
Article 1 of the First Protocol and Article 8 are particularly important in relation to occupation orders. Under the Family Law Act 1996 (FLA 1996) an occupation order made by a domestic court regulates the occupation of the family home which usually involves removing the abuser so that the victim and children can remain there. Such an order will inevitably breach Article 1, that every natural or legal person is entitled to the peaceful enjoyment of his possessions, particularly where the order is made under S.33 FLA 1996 and could last for an indefinite period. However, Article 1 also states that such interference is allowed “to enforce such laws as it deems necessary to control the use of the property in accordance with general interest”. Thus, the courts must again balance the general interests of the community and the requirement to protect the individual's fundamental right. The balance will be struck when the courts apply the factors laid down in S.33-S.38 FLA 1996 when deciding whether or not an order should be made. Equally, when the court is applying the balance of harm test under S.33 and S.35 FLA 1996 they will observe the principle of proportionality. Furthermore, a respondent who relies on Article 8, the right to respect for private and family life, will be made aware that it is a qualified right and the courts can interfere to protect the health and rights of the Applicant.

In terms of the court's power to make non-molestation orders, which prevent violence or harassment, and particularly the power to make them without notice to the Respondent, it poses a particular challenge to Article 6, the right to a fair trial. This is also the case when occupation orders are made without notice. If the Respondent is unaware of proceedings clearly there is a breach of Article 6. In the case of Chalmers -v- Johns (1999), the court said caution must be exercised when making without notice orders. However, the rationale is the protection of the individual, and the fact that an on notice hearing must take place thereafter as soon as is just and convenient, which means within 7 days. Thus the temporary prevention of a fair trial is justified to secure the safety of the applicant in the proceedings.

Similarly, the courts have the ability to make a Contact or Residence Order in relation to a child, without notice, in exceptional circumstances, but on the understanding that an on notice hearing takes place as soon as it is just and convenient. Again this has been challenged under Article 6 as in the case of Re J (Abduction: Wrongful Removal) (2000). A mother had unlawfully removed a child to South Africa. The father obtained a without notice order for the child's return. The mother appealed. The court stated that matters relating to children often had to be dealt with as a matter of urgency. The father had the right to obtain the order without notice. The mother had not been denied her right to a fair trial because she did have the opportunity to challenge the order.

A further point in relation to children relates to the court drawing adverse inferences from a parent who refuses to provide a blood sample. In the case of Re: T (Blood Transfusion) 2001, this action was considered unfair and contrary to Article 6 ECHR 1998.

Furthermore, in terms of non-molestation and occupation orders if the Respondent is in breach of such an order it is important that a court, when sentencing for the breach, explains why the punishment is being given, the length of any custodial sentence and the reasons why, to ensure compliance with Article 6. Furthermore, in order to comply with Article 5, the right to liberty, and Article 8, the right to respect for private and family life, any order made must be clear and unambiguous so that the Respondent fully understands the obligations under it, otherwise it may be challenged.
We have also seen how the HRA has impacted in relation to the status of unmarried parents. The unmarried father of a child does not automatically have parental responsibility, but has to acquire it by being on the birth certificate, or through a parental responsibility agreement or order, unlike the married father who has it automatically. Some unmarried fathers have challenged this in the European Court stating an infringement of Article 8, as in the case of B -v- UK (2000). However, the European Court have stated that there is justification for the different treatment to say there is no such infringement. Basically the married father would have the child in his care to a significant degree and would therefore have different responsibilities compared to the father who simply had contact. It is further justified on the basis that the distinction stops fathers with no interest in the child or who would seek to use parental responsibility as a weapon from doing so.

As regards children and particularly the issue of permanent removal of a child from the UK, the European Court has dealt with several cases involving challenges under Article 8, the right to respect for private and family life. There is the potential for a breach of Article 8 whatever the court decides. If permission is granted, the parent left behind could argue his rights have been infringed. If permission is refused the parent with care could argue the same. This was first examined in Re: A (Permission to Remove a Child from Jurisdiction: Human Rights) (2000). The court resolved the issue by stating that it was a balancing exercise – the rights of the parents and the child, with the welfare of the child being of crucial importance, and if that had been done, then there was no infringement of Article 8. Furthermore, in the case of Payne -v- Payne (2001) the court felt it was necessary to set out the guidelines for such applications to ensure compliance with Article 8. Such guidelines revolved around looking at the proposals, the effect on refusal, the effect on permission for both parties and child, and the motivation of the parties to the application.

What is apparent is that the HRA 1998 and ECHR 1998 has impacted on all areas of family law and irrespective of declarations of incompatibility and changes in the law, our domestic courts are always seeking to justify their actions with Europe in mind to ensure that infringements do not take place.

**Question 4(a)**

An application for an occupation order under S.33 Family Law Act 1996 (FLA 1996) occurs if the applicant has the right to occupy the home. In the course of such applications, as was stated in the case of Chalmers -v- Johns (1999) the Court of Appeal stated that the balance of harm test should first be applied, and thereafter the statutory factors in S.33(6) FLA 1996.

The test involves deciding whether greater harm will be caused by making an order or refusing one. If the test reveals that greater harm would be caused by not making the order, then the court has a duty to make an occupation order under S.33 FLA 1996.

The balance of harm test involves three questions:-

(a) Is the applicant and/or relevant child likely to suffer significant harm if an order is not made? If yes then,

(b) Is the respondent and/or relevant child likely to suffer significant harm if an order is made? If yes, then,
© Is the harm to the respondent/relevant child equal to or greater than the harm to the applicant/relevant child? If no then the test is satisfied and the court must make an order. If yes, the test is not satisfied and the court must then look at the statutory factors and can exercise discretion.

The FLA does not define significant but harm is defined in S.63 FLA 1996 as “ill treatment or impairment of health”. Furthermore, if it involves a person under 18 years, the definition is amended to include “......impairment of health or development”. Ill-treatment includes physical and non physical, and for a child includes sexual abuse. Similarly health incorporates physical and mental health, and development covers all aspects – physical, intellectual, emotional, social and behavioural.

The application of the balance of harm test, and some would say, the unfairness, is illustrated in B -v- B (Occupation Order) (1999). The parties were married and they lived with the husband’s six year old son, and their own child aged 11. The wife left the home following the husband’s violence, taking their child with her. She applied for an occupation order under S.33. The Court found that the wife and child would suffer significant harm if the order was not made. It also found that the husband and child would suffer significant harm if the order was made because the child would have to move home and school. The court said that was greater than the harm to the wife and other child. The Local Authority would have a duty to re-house the wife and child, whereas due to the husband’s violence there would be no such duty and he and the child would be homeless. Balance of harm test not satisfied for the applicant, and no duty to make the order.

The case seems to illustrate the unfairness to the abused wife, but also demonstrates the protection to relevant children.

**Question 4(b)**

Cohabitation refers to two people who are not spouses or civil partners living together as if they were. They often refer to themselves as “common law spouses” and believe that they gain the same rights as married couples and civil partners. Unfortunately that is not the case. Despite the rise in this form of adult partnership largely due to changing social attitudes, such couples have no rights against each other on the breakdown of the relationship, and will be forced to rely on property and trust law (Law of Property Act 1925, Trust of Land and Appointment of Trustee Act 1996  Constructive and Resulting trusts) to resolve disputes.

With the steep increase in cohabiting couples, we have seen an increase in the use of cohabitation contracts. Such contracts can deal with ownership of the home and other property, payment of bills and ownership of joint accounts, maintenance in relation to any children, and even matters such as the division of household chores. However, such contracts have always been void (invalid) on the grounds of public policy on the basis that they undermine the status of marriage.

However, it now appears to be the case that contracts between cohabitees regulating financial and property matters on termination of the relationship would be upheld by the courts, as opposed to a contract for cohabitation that simply requires parties to cohabit, which would still be deemed void based on public policy. This was illustrated with the case of Sutton -v- Mishcon de Reya and Another (2004) A solicitor had drafted a cohabitation contract for a gay
couple which provided for them to live in a “master and servant” relationship, the claimant being the “master”. As part of the contract the “servant” was to transfer all his wealth to the master. The “servant” changed his mind. The “master” was unhappy. A settlement was negotiated but the claimant received considerably less. The claimant sued the solicitor saying that it was due to poor drafting that he received less money. The court held that the arrangement was a contract for cohabitation and would have been unenforceable.

Although the courts would look at contracts between cohabitees nevertheless they will scrutinize the contents and may still refuse to enforce on other grounds. The court may say that the basic elements of a contract have not been complied with, such as the lack of an intention to create legal relations, or they may consider that the contract was entered into as a result of undue influence being brought to bear on one of the parties.

There has been more and more pressure for reform to give cohabiting couples some rights on the breakdown of their relationship, with a view to protecting the weaker party who may otherwise be left with no remedy. There is clear inequality in the law with cohabitants being treated differently to people who are married or in a civil partnership. This demonstrates the stagnant nature of the law despite the changes in social attitudes. As a result of this pressure the Law Commission published a report “Cohabitation: The Financial Consequences of Relationship Breakdown” in July 2007. This recommends that cohabiting couples should have rights when separating but they must have a child together or have cohabited for a minimum period of time (two to five years has been suggested). However, there is also provision for couples to contract out of the scheme by signing an agreement, but the agreement could be set aside if manifestly unfair. In addition, first consideration would be given to the welfare of any minor child and the court would also consider statutory factors when considering division of property, similar to those in S.25 Matrimonial Causes Act 1973 (MCA 1973).

The Government have not implemented the Commission’s proposals, but the Cohabitation Bill was introduced in December 2008. This provides a framework of rights and responsibilities for cohabitees to provide basic protection on the breakdown of their relationship. It incorporates cohabitees with a child, or those who have lived together for at least two years continuously, and with the provision to opt out. Currently, this Bill is still before Parliament, and who knows what the position will be in the current political climate with a Hung Parliament. If successful we may see the law for cohabitants being streamlined with the law relating to married couples and civil partners on the breakdown of relationships.

SECTION B

QUESTION 1

1(a)

Jaswinder requires financial assistance whilst the marriage is subsisting because she has no income and no immediate means of earning money, therefore cannot feed and clothe herself or pay the bills. She can apply to the family proceedings court under S.2 Domestic Proceedings and Magistrates Courts Act 1978 (DPMCA 1978) for financial provision in the form of a lump sum and/or periodical payments order. In order to apply Jaswinder must satisfy one of the requirements contained within S.1 DPMCA 1978, that being that Raj has failed to provide reasonable maintenance for her.
The court will look at the facts of Jaswinder's case to assess her reasonable maintenance requirements. There is no guidance in the DPMCA 1978 of what would be reasonable so it is a question of fact for the court to decide based on Jaswinder's circumstances and considering the statutory factors contained within S.3(2) DPMCA 1978 which include the resources, obligations and conduct of the parties.

It is highly likely that Jaswinder would be entitled to periodical payments, fortnightly or monthly, sufficient to meet her needs. Those payments could be fixed by the court or be indefinite, the latter of which is more likely in view of the length of time that Jaswinder has not worked. Furthermore, she could apply to vary the amount if such monies were found to be insufficient.

1(b)

Financial provision for Jaswinder following divorce proceedings will be governed by the Matrimonial Causes Act 1973 (MCA 1973). The types of order that the court could make are contained within S.22 to S.25 MCA 1973. In deciding what order to make the court will take account of the statutory factors contained within S.25(2) MCA 1973, all the circumstances of the case, and the clean break provisions contained in S.25A MCA 1973. They will also look at case law. With reference to the statutory factors the court, under S.25(2)(a)MCA 1973, will look at the income, earning capacity, property, and other financial resources now or in the future of both Jaswinder and Raj. The court will note that Jaswinder has no income and her earning capacity is low in view of her time out of the workplace in accordance with the decision in *M -v- M (Financial Provision)* (1987). The court will note that Raj has substantial wealth in terms of annual income and the value of his business, and income from rental properties. The court will also take note of the three properties of the marriage, all of which are free of mortgage, which have a combined value of £850,000. Raj may argue that the home in which they live is non-matrimonial property on the basis that it was inherited from Raj's Uncle before the marriage. However, the case law, such as *Cowan -v- Cowan* (2007) suggests that the court will take all the property into account, and the fact that she has maintained that property and made it a home.

The courts will then consider the needs of both Jaswinder and Raj under S.25(2)(b) MCA 1973. This is a balancing act. The court have to ensure that Jaswinder has a home, and sufficient money for food, clothing and bills, yet at the same time ensuring that Raj has sufficient to do the same. Both parties require housing but Jaswinder also requires maintaining in view of her low earning capacity. Since the case of *White -v- White* (2000), where there is surplus assets available to be share, as in Raj's case, the court are no longer limited to meeting reasonable requirements, it is more about applying he yardstick of equality and reaching overall fairness.

The court will also look at the fact that Raj and Jaswinder enjoyed a very lavish standard of living before the breakdown of the marriage. Under S.25(2)(c) MCA 1973, the courts will try to ensure that both parties maintain, where possible, a good standard of living, and that any drop does not simply affect one spouse and not the other. In big money cases, as now, the courts will try to ensure that both spouses maintain the high standard of living.

The factor stated in S.25(2)(d) MCA 1973 is the age of the parties and the duration of the marriage. The court will take note that Raj is 48 and Jaswinder is 36 years, so both have several more years ability to work. They will also deem the 14 years as a relatively long marriage, certainly not short. Jaswinder is
relatively young, and without children, therefore there is the opportunity for her to work again but due to her absence from the workplace for the last 14 years it will not be immediate, but will require retraining. In the meantime she needs to be supported.

One factor which has particular relevance to Jaswinder, is S.25(2)(e) whereby the court will look at the contributions which each of the parties' has made to the marriage, including Jaswinder's contributions to looking after the home. In the case of White -v- White (2000) the court stressed that there was no difference in quality between financial contributions and contributions by looking after the home and/or family. Furthermore, where a wife, like Jaswinder, has worked and helped with the husband's business, that will be taken in to account. Thus, Jaswinder's has contributed to her husband's financial success by hosting the dinner parties, wining and dining the clients to secure them for the business. In the case of Gojkovic -v- Gojkovic (1990) a substantial lump sum was awarded to the wife in recognition of her unpaid contributions to the husband's business.

The court will also consider how Raj and Jaswinder have conducted themselves, pursuant to S.25(2)(g) MCA 1973. They will take any conduct into account which, in their opinion, would be inequitable to disregard, such conduct being “gross and obvious”. It must be something more than the petty squabbling which takes place on marriage breakdown. In Jaswinder's case she is unlikely to succeed on this factor.

The courts would also consider whether to exercise it's powers under S.25A MCA 1973 to impose a clean break between Raj and Jaswinder, so that they could get on with their respective lives without a continuing financial tie such as periodical payments, and put the past behind them as stated in the case of Minton -v- Minton (1979). Although Raj and Jaswinder have no children therefore a clean break may seem appropriate, the problem is the lack of financial independence in respect of Jaswinder. It may be more appropriate in the circumstances to consider a deferred clean break, which effectively involves setting a date for the end of periodical payments. The fixed term imposed would have to be sufficient to allow Jaswinder to adjust without undue hardship to the termination of financial dependence on Raj.

The courts will also consider the principles that have stemmed from cases such as White -v- White (2000), Miller -v- Miller (2006), McFarlane -v- McFarlane (2006) in terms of applying the "yardstick of equality", and also “compensating” the party who gives up a good career to look after the home and/or family.

Based on all the circumstances of the case, the application of the statutory factors, the relevant case law, and the provisions of the clean break, I would suggest the following financial provision would be appropriate in this case:-

Initially Jaswinder is likely to be entitled to maintenance pending suit under S.22 MCA 1973, which allows for financial provision after the issue of the divorce petition but it ends on decree absolute. This would give her the short-term financial support needed pending resolution of the finances.

The matrimonial home to be transferred to Jaswinder thus ensuring that her housing needs are accommodated, which is a property adjustment order under S.24(1) MCA 1973. In addition a lump sum payment to Jaswinder to compensate her for her contributions to Raj's business and its success, and being the homemaker, pursuant to S.23(1)(c) MCA 1973. In conjunction with this a periodical payments order pursuant to S.23(1)(a) MCA 1973 for a monthly sum
to cover her living, housing and personal expenditure and taking account of the standard of living enjoyed during the marriage. This should be fixed in time, perhaps for say five years, to allow Jaswinder to retrain and become employed, thus a deferred clean break.

Raj would then retain the remaining properties which he could sell, and with the income he has would have the ability to purchase a house for himself. He has sufficient income to maintain his standard of living.

**Question 2**

Paul may be able to petition for Nullity immediately in accordance with S.12 Matrimonial Causes Act 1973 (MCA 1973) on the basis that at the time of the marriage, Hannah was pregnant by someone else and he had no knowledge of that. This would allow the marriage to be annulled relatively quickly. The effect of S.12 MCA 1973 is that the marriage is deemed valid until a party obtains a Decree of Nullity, that it is voidable. In those circumstances, the parties could still ask the court to deal with financial matters. However, Hannah has said that the baby may be from her one night stand but it is not conclusive. In the absence of certainty Paul would not be able to proceed with nullity proceedings.

We are told that Paul and Hannah have not had any sexual intercourse since the date of the marriage on the basis that Paul is repulsed to the point of sickness at the very thought of Hannah being pregnant. Either Paul or Hannah could immediately apply for a Decree of Nullity on the basis of S.12(a) MCA 1973, that the marriage has not been consummated because of the incapacity of either party. Paul could actually petition based on his own incapacity. In either event the incapacity must be based on either a physical abnormality or on psychological causes. It was stated in the case of *G -v- G* (1924) that revulsion to the act of intercourse with a spouse may suffice. However, either Paul or Hannah would have to establish that the incapacity is permanent and incurable to successfully obtain a Decree of Nullity. This would be highly unlikely in view of the existing case law, but it may be that Hannah could petition based on Paul's wilful refusal to consummate the marriage, on the basis he is using revulsion simply as an excuse. It seems to be the case that pregnancy repulses Paul, but otherwise he would not have issues with consummation, thus it lacks permanence., but it may be successful based on wilful refusal to consummate because clearly Paul has not, and does not, want any physical relationship with Hannah since the date of the marriage.

Aside from Nullity, the marriage could only be ended by way of divorce proceedings by either Paul or Hannah. Paul or Hannah would have to establish per S.1(1) MCA 1973 that the marriage had irretrievably broken down. That would have to be proven by establishing one of the five facts contained within S.1(2) MCA 1973, namely adultery and intolerability, behaviour, desertion, two years' living apart with consent, and five years' separation.

Unfortunately because Paul and Hannah have not been married for a year, they cannot pursue divorce proceedings. Under S.3(1) MCA 1973 a divorce petition cannot be presented within one year of marriage. This is an absolute bar so as to prevent hasty decisions. Paul and Hannah must therefore wait until 6th April 2011 before either can commence divorce proceedings. However, whoever petitions for divorce can rely on matters which occurred during the first year of marriage in accordance with S.3(2) MCA 1973.
Hannah, on the expiration of a year, could commence divorce proceedings based on S.1(2)(b) MCA 1973 “that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent”. This is a two part test, both objective and subjective as illustrated in Livingstone-Stallard -v- Livingstone-Stallard (1974) where you ask “would any right thinking person come to the conclusion that this husband has behaved in such a way that this wife cannot reasonably be expected to live with him?” Basically any reasonably minded person would come to the conclusion that Hannah could not reasonable be expected to live with Paul after everything he has said and done, and continues to do. In that case it was held that constant criticism by the husband of the wife was sufficient for a behaviour petition.

Hannah could rely on Paul’s conduct – his anger, lack of physical relationship, sleeping in the spare bedroom, telling her to “get rid of the baby”, behaving like a single man with lads holidays and excessive drinking, humiliating her on facebook, and causing trouble with her employers. Behaviour may be acts or omissions, or a course of conduct as stated in Katz -v- Katz (1972). Paul’s actions would constitute a course of conduct for the purpose of a behaviour petition. Hannah could rely on the events during the course of the last year to date.

Similarly Paul could petition for divorce based on Hannah’s unreasonable behaviour. The same principles would apply. He could cite her pregnancy with two potential fathers as an act of behaviour, and knowing that he never wanted children getting pregnant breaking the trust between them. He could also cite her recent conduct in going and spending time with the male work colleague, who is potentially the father.

If Paul believes that Hannah has been cheating on him with the work colleague he may look at pursuing divorce proceedings based on her adultery under S.1(2)(a) MCA 1973, that “the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent”. Again this is a two part test but there does not have to be any connection between the adultery and the intolerability. Paul would have to establish that there had been voluntary sexual intercourse, since the marriage, between Hannah and the male work colleague. Paul is unlikely to be able to establish this unless Hannah is prepared to admit to it. In terms of intolerability he could cite the revulsion to the pregnancy to establish this because it is a subjective test. The question would be “does Paul find it intolerable to live with Hannah?” and the reason why can be almost anything.

In conclusion, Paul and Hannah do have the possibility of nullity proceedings under S.12 MCA 1973 which could be commenced now, without waiting for the one year since the date of the marriage to have elapsed. However, based on the information we have it would appear that such petitions would be weak and therefore unlikely to be successful for reasons already stated. So, if Paul and Hannah wish to bring their marriage to an end quickly, then on 6th April 2011 one of them must pursue divorce proceedings based on S.1(2)(b) MCA 1973 – behaviour, or Paul could consider issuing based on S.1(2)(a) MCA 1973 – adultery and intolerability, the latter of which is uncertain. Otherwise, Paul and Hannah would have to live separate and apart for two years and then one of them petition for divorce on that basis with consent from the other.
Question 3

3(a)

An application would be made for a S.8 order under the Children Act 1989.

Parental responsibility is defined in S.3(1) Children Act 1989 (CA 1989) as “all the rights, duties, powers, responsibility and authority which by law a parent of a child has in relation to the child and his property”.

Simon automatically has parental responsibility as he was married to Mary at the time of birth of the children and he is the biological father. Tom does not have parental responsibility for Simon’s Paul, Noah and Teresa.

As a step-parent Tom could acquire parental responsibility of Paul, Noah and Teresa, only by Simon’s agreement or by applying to the court for a parental responsibility order.

Tom could, under S.10(5) CA 1989 apply for a residence order as being “a party to a marriage who has treated the children as children of the family”. He would not need the permission of the court to do so.

3(b)

A residence order determines who a child is to live with. There is no presumption that one parent is better suited to care for children by reason of gender. In Simon’s case, as the only living biological parent, he will be seeking the order so that the children Paul, Noah and Teresa are taken from Tom, their stepfather.

When determining whether or not to make an order for Residence in relation to Paul, Noah and Teresa to Simon, the court must have regard to the fundamental principles contained within S.1 CA 1989:

(a) The welfare of the child is of paramount importance - the welfare principle. By doing this the law ensures that all other factors are judged by reference to how they affect or are likely to affect the children. The rights of the child must be balanced against the right of the parents.

(b) The court should not make an order unless it would be better for the child than making no order – the no order principle. This places a burden on the person applying for the order to convince the court why it is in the interests of the child that an order should be made.

(c) Any delay in dealing with such matters is likely to prejudice the child’s welfare – the no delay principle. Delay in dealing with matters affected a child such as where they live or who they see can only prejudice the child and therefore any delay should be kept to the minimum.

When the court is considering whether or not to make the residence order they must have regard to all the factors contained within the welfare checklist under S.1(3) CA 1989.

The court will first look at the wishes and feelings of the children. Generally, the court will look at the age and maturity of the child and the more mature a child is
the more weight that will be attached to their views. The case of *Gillick v- West Norfolk and Wisbech Area Health Authority and the DHSS* (1985) is particularly relevant here, often referred to as “Gillick competence” - basically a child does reach sufficient maturity and understanding to make their own decisions. The court will almost certainly consider what Paul has to say in view of his age, but it is highly unlikely that any weight would be attached to Noah’s views, and certainly not to Teresa’s.

The court will look at the physical needs of the children, such as adequate food and accommodation. If both can meet the physical needs it matters not who is the richest. If all things are equal the fact that one person can provide a better home may carry some weight. It would appear that Simon and Tom can both provide in terms of physical needs.

The court will look at the vital factor of emotional needs/emotional attachment. The court will consider the emotional needs of the children to have relationships with parents but also with siblings, and it is very rare that children are separated. The court will look closely at the effects on the three children if separated from baby Sky, and also from Tom, whom they are very close to. The court will be clear that the children need to maintain their relationship with Sky and Tom.

The court will also consider the educational needs of the children. They will want to ensure that both Paul and Noah retain stability with their schooling, which is particularly important having lost their mother. However, Simon may advocate that his wish is that his children are practising and educated Catholics and Tom has been quite clear in his views on religion and Tom will not maintain that important thread in their upbringing.

The court must also consider the impact that any change in the current position will have on the child. If a child is well established and settled in a happy home it will be difficult to persuade the court that a change in the child’s best interest. This is a critical factor. The court’s often refer to it as maintaining the “status quo”. It was stated in *Re B (Residence Order: Status Quo)* (1998) “the status quo will generally be upset only if there is a definite advantage to the child in doing so”. Furthermore, in *Allington v- Allington* (1985) “....particularly in the early years continuity of care is most important........disruption of established bonds is to be avoided wherever possible”.

Clearly, all Simon’s children are settled in their current home and it will probably be difficult for Simon to establish that it is in their best interests to change where they live and detach them from Sky and Tom. Particular reference is made to Teresa who is only three years of age, the court will want to ensure continuity of care particularly when she has lost her mother, and that appears best served by Tom who has been the child carer anyway. The courts will look at the capabilities of both parties to meet the children’s needs. They will look at both Simon and Tom. Tom has an eight month old daughter, but he stays at home and has been the main carer for all the children. The court are likely to presume that he would have the capability to continue to do that. Simon, however, works long hours and is away a lot of the time. He would either have to change his job, or employ childminders, and is that in the best interests of the children? If the courts find that Simon is unable to care for the children because of all his other commitments they will not make a residence order in his favour. This was illustrated in the case of *Re M (Handicapped Child: Parental Responsibility)* (2001).
Finally, the courts will have to consider any harm the children have suffered or are at risk of suffering. Harm is defined in S.31(9) CA 1989 but generally covers all types of impairment or ill-treatment to health or development. Surely Simon's children are at risk of suffering harm if they are not able to see Sky and Tom. Similarly what about the harm they may suffer if they are not able to live with their natural father. The court will have to examine this carefully and make the decision. They will also have to view harm in the context of the harm that they are suffering by not being raised as Catholics by Tom, which is a wish of their natural father who has parental responsibility and the right to determine their education and religion.

In conclusion, based on the application of the factors and the welfare of the children being of paramount importance, it is highly unlikely that Simon will be granted a residence order in relation to his children. However, Simon and Tom could consider a shared residence order with a view to meeting the needs of the children. Originally such orders were only granted in exceptional circumstances (which this could warrant anyway), but the courts are more flexible with their approach now and the courts are more willing to grant them to reflect the reality of a child's situation. It may be a way forward whether it is the children residing with Tom Monday evening to Friday morning and with Simon Friday morning to Monday morning.

**Question 4**

Molly and Amy have the protection of the Family Law Act 1996 (FLA 1996) by virtue of the fact that they are associated persons and relevant child respectively under S.62(2) FLA 1996. Molly's association is by virtue of being a former cohabitee. Amy is a relevant child because she is a child who is living with, or might reasonably be expected to live with either party to the proceedings.

Molly could apply for an occupation order and a non-molestation order.

The occupation order regulates occupation of the family home. For the purpose of the application Molly must be associated and the parties must have lived at the property together as their home. On the basis that she meets both criteria the application would be made under S.36 FLA 1996 which covers:-

- the applicant being a cohabitant or former cohabitant of the respondent,
- the applicant not being entitled to occupy the home,
- the respondent being entitled to occupy the home.

Clearly she is a former cohabitant; she does not own the home whereas John does, hence the application under S.36 FLA 1996.

Molly could ask the court to make a mandatory order giving her and Amy the right to enter the house and occupy it, and requiring John to allow her to do so. However, in view of the current situation and the violence that would not be sufficient to ensure her safety. She could also ask the court to exercise it's discretion and make further regulatory orders that:-

- only she is to occupy the family home,
- that John be stopped from occupying the home,
- that John leave the family home, and
- that John be excluded from a defined area around the home.
In deciding whether or not to make the mandatory order the court will have to take into account the statutory factors, which are virtually the same as those in S.35 FLA 1996 with some additional matters:-

- The housing needs and resources of both parties. The fact that Molly and her daughter Amy are living in cramped conditions away from their home environment, whilst John, alone, could find alternative accommodation.

- The financial resources of both parties. John has an income, whilst Molly and Amy were reliant on John. Molly could apply to the Local Authority for accommodation and for welfare benefits.

- The likely effect of either making or refusing an order on the health, safety or well-being of the parties and any relevant child. Clearly if the court refused the order Molly and Amy would be limited to cramped accommodation, Amy having been taken away from her home and her belongings, which would be detrimental. Clearly, if they make John homeless they have no duty to rehouse him.

- The conduct of the parties. John's conduct has been appallingly and the court would recognise that his anger, threats of violence and actual violence had to be taken into consideration.

- How long since the parties stopped living together.

- The nature of the relationship and particularly the level of commitment involved. In conjunction with this the length of cohabitation, and whether the parties had any children. Clearly they dated for several years, and then lived together for a further two years and they have a child together.

Under S.36 FLA 1996, if the court decide to make a mandatory order in favour of Molly and Amy, the court then consider some questions (similar to the balance of harm test) to consider whether or not to make the regulatory orders. Molly would be advised that the court do not have a duty to make any regulatory orders even if the questions are answered in her favour. The court ask is Molly and Amy likely to suffer significant harm caused by John if a regulatory order is not made and then ask, will John suffer equal or greater harm if a regulatory order is made. Basically, the court will have to balance who is likely to suffer the greater harm. In recent years, even where the applicant has managed to establish the greater significant harm, the courts have been reluctant to make the order against a person who is entitled to occupy their home, as is the case with John. Furthermore, an order in Molly's favour, under S.36 FLA 1996, could only be made for a maximum of six months, demonstrating that the law does not favour cohabitants.

It could also have been classified as an application under S.33 FLA 1996 on the basis that Molly has an interest in the property by virtue of a resulting trust by reference to her contributions to the purchase of the property. As such, the same types of orders could be made, as previously discussed. Furthermore, the balance of harm test would still be applicable. However, if established the court would have a duty to make an occupation order, whereas under S.36 the court always has a discretion irrespective of the test being satisfied. The factors to be taken into consideration would be those under S.33(6) which again are the same as the above-mentioned upto and including the conduct of the parties. In addition the case of Chalmers -v- Johns clearly states that the balance of harm
test is applied first, and if not successful the court then look at the factors to see whether they have a discretion to make the occupation order.

Molly can also make an application under S.42 FLA 1996 for a non-molestation order, which is an order that forbids the respondent from molesting the applicant and any relevant child. Molly would seek this so as to protect herself and Amy from John.

There is no definition of molestation in the FLA 1996, but reference is made to the body of case law that exists to establish what will suffice. Almost certainly John's threats of violence and actual violence will suffice. For example, in the case of *George v George* (1986) screaming abuse at the wife on collection of the children was deemed molestation.

In deciding whether or not to make a non-molestation order in Molly's favour, the court will look at all the circumstances of the case including the need to secure the health, safety and well-being of her and Amy. Molly will have to establish that the order is needed to protect her and Amy. If the order is granted it can refer to molestation generally, or particular acts, or a combination of both and it can be made for a specific time period (normally six months) or until further order of the court.

Molly would apply to the County Court with a freestanding application for an occupation order and a non-molestation order. In view of the extreme violence Molly could make the applications ex-parte (without notice). Non-molestation orders are not particularly difficult to obtain without notice, but the court act cautiously in terms of occupation orders because it means excluding someone from their home without even knowing of the proceedings. If Molly was successful on either aspect of the without notice application, there would be an on notice hearing a few days later (within seven days) to ensure that John's right under Article 6 ECHR 1998 to a fair hearing is protected.